IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000816
[2019] NZHC 763

BETWEEN	SELF-REALIZATION MEDITATION AND HEALING CENTRE CHARITABLE TRUST (NEW ZEALAND) Plaintiff
AND	IAG NEW ZEALAND LIMITED Defendant
AND	H CONSTRUCTION NORTH ISLAND LIMITED (in receivership and in liquidation) First Third Party
AND	ORANGE H MANAGEMENT LIMITED (in receivership and in liquidation) Second Third Party
AND	BRENCHLEY DEVELOPMENTS LIMITED Third Third Party
AND	BUILDING ONWARD LIMITED (Proposed) Fourth Third Party
AND	HI TECH BUILDING SYSTEMS LIMITED (Proposed) Fifth Third Party
AND	ORANGE H GROUP LIMITED (in receivership and liquidation) Sixth Third Party

Hearing: 26 March 2019

Appearances: No appearance for the Plaintiff
N S Gedye QC for the Defendant
S D McIntyre for (Proposed) Fourth Third Party

Judgment: 10 April 2019

JUDGMENT OF NATION J

Introduction

[1] The defendant (IAG) insured the plaintiff (Self-Realization) against earthquake damage. IAG contracted through the first, second and sixth third parties (collectively and individually referred to in this judgment as Hawkins) to arrange for earthquake repairs to be carried out. Three building companies were successively contracted by Self-Realization to carry out repairs. Those contractors were the third third party (Brenchley), fourth third party (Onward) and fifth third party (Hi Tech).

[2] In its pleadings, Self-Realization says certain earthquake damage, for which it was insured by IAG, has never been repaired. It asks the Court to order IAG to do or pay more. This is an application for review of an Associate Judge's decision striking out third party notices against Onward and Hi Tech. The issue is now whether one of those contractors (Onward) should have remained joined as a third party.

Background

[3] Self-Realization owned two buildings on adjoining properties at 100 Highsted Road and 233A Sawyers Arms Road, Christchurch. They were insured with IAG. They were both damaged in the Christchurch earthquake sequence of 2010 and 2011.

[4] Self-Realization filed these proceedings against IAG on 1 September 2016.

[5] On 14 August 2017, IAG filed an application for leave to join defendants or alternatively to join third parties.

[6] On 15 September 2017, Self-Realization filed a notice of opposition to IAG's application. Counsel for Self-Realization and IAG filed a joint memorandum consenting to joinder of third parties.

[7] On 5 October 2017, IAG filed third party notices against Hawkins and the three contractors as third parties.

[8] On 21 May 2018, Onward and Hi Tech filed applications to set aside the third party notices against each of them.

[9] On 21 June 2018, IAG filed amended statements of claim against all third parties.

[10] On 14 August 2018, Associate Judge Osborne (as he then was) struck out the third party notices against Onward and Hi Tech.

[11] On 11 October 2018, QBE Insurance (Australia) Ltd (QBE) signed a consent memorandum agreeing to an order under s 9(4) Law Reform Act 1936 that it be joined as a third party and for leave to be granted to IAG to issue a third party notice and claim against QBE.

[12] On 1 November 2018, IAG filed a second amended statement of claim against third parties in which QBE Insurance (International) Pty Ltd (QBE) was joined as a third party.

[13] In that statement of claim, IAG summarises Self-Realization's claim against IAG. IAG denies it has breached its policy with Self-Realization. However, IAG pleads, if it is held liable for any loss suffered by Self-Realization (which is denied), such loss was caused or materially contributed to by Hawkins and Hawkins would have breached its contractual obligations to IAG.

[14] As against QBE, IAG says Hawkins held a liability policy of insurance with QBE under which QBE had to indemnify Hawkins against any liability which Hawkins would have to IAG on Self-Realization's claims. IAG says the Hawkins companies are in liquidation so do not have the capacity to meet IAG's claims.

[15] IAG claims as against QBE that, under s 9 Law Reform Act 1936, IAG are entitled to a charge on monies Hawkins would have been entitled to from QBE on these claims.

[16] The Hawkins companies were all in liquidation at the time Onward's and Hi Tech's applications to strike out third party notices were heard by Associate Judge Osborne.

[17] Since the Associate Judge gave his decision, Hi Tech has gone into liquidation. An affidavit has been filed confirming that Brenchley has not traded since 2017 and the company's director died in late 2018. Brenchley is currently insolvent. It is likely it will be placed into liquidation or be allowed to be removed from the Companies Register.

[18] Mr Gedye for IAG accepted that, of the originally joined third parties, the proceedings would continue only against Onward as a third party if, on review, there is a change to the Associate Judge's decision. On this application for review, I thus need deal only with the review of the decision as it concerns Onward.

[19] In its amended statement of claim of 21 June 2018, IAG alleged Onward entered into a building agreement with Self-Realization dated 7 April 2014 with an agreed scope of works to remedy defective repairs done by Brenchley and to repair other earthquake damage which had not been included in Brenchley's scope of works.

[20] IAG pleaded that, under its policy, it did not indemnify Self-Realization for defective building work. It pleaded that, if Self-Realization's allegations were correct (which was denied), then Onward would have been in breach of their agreement with Self-Realization and would thereby have caused to Self-Realization the loss (or part thereof) as claimed by Self-Realization against IAG.

[21] The relief claimed by IAG against Onward was a declaration under s 2 of the Declaratory Judgments Act 1908 that Onward is liable to Self-Realization under their contract for an amount to be particularised prior to trial.

The Associate Judge's decision

[22] The Judge noted Self-Realization, by its pleadings and by a letter from its solicitors to Onward's solicitors of August 2018, was not making any allegation in its claim against IAG that repairs effected by the builders were substandard or defective.[1] He said Self-Realization was instead basing its claim on the obligation of IAG to reinstate the properties or pay indemnity value which it contended IAG had breached.

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1 *Self-Realization Meditation and Healing Centre Charitable Trust (New Zealand) v IAG New Zealand Ltd* [2018] NZHC 2077.

He noted that Self-Realization was claiming that all earthquake damage it had identified in its claim remained to be reinstated.

[23] The Associate Judge referred to IAG's denial that it had breached its obligations under the policy, including its assertion that the policy did not indemnify the plaintiff for defective building work. To the extent the claim was for such work, IAG would not be liable for the cost of remediating or rebuilding the same as undertaken by the plaintiff and/or its contractors. He said that, in short, IAG was asserting that it had paid for scope repairs and any liability for defective repairs lay with others.

[24] The Judge noted that, in respect of Self-Realization's claims as to its Sawyers Arms Road property, the third party claim could be against Onward only. The evidence for IAG put the total cost to rectify all allegations of defective and substandard workmanship on that property at $5,882.52 (including GST). He said the amount of that claim could never justify the involvement of the builder in question as a third party in a claim pursued by the building owner against its insurer in the High Court proceedings of some complexity. Mr Gedye said there was no issue taken with his conclusion in that regard.

[25] The Associate Judge referred to the grounds on which Onward had applied to set aside the third party notices. He noted that Onward had expressly recognised that any order setting aside the notices would be without prejudice to the right of IAG to pursue a claim against the third party in an independent proceeding.

[26] The Associate Judge referred to evidence in affidavits from Nicholas O'Neill, the sole director and shareholder of Onward, from Justin Kent, Hi Tech's contract manager, and for IAG from a structural engineer Ruchika Kaur and a project manager Matthew Gorinski.

[27] The Judge referred to r 4.16(3) which provided the jurisdiction for the Court to set aside a third party notice and the way in which courts had identified the function of third party proceedings and the considerations which a Court should take into

account on an application for orders setting aside third party notices.[2] He said the parties did not take issue over the principles to be applied but emphasised different principles. IAG emphasised Gendall J's reference in *Robin v IAG New Zealand Ltd* to it being "in the interests of justice that the proposed defendants be present in order to deal with all relevant issues, to represent their own interests and to avoid a multiplicity of hearings"[3] , and to his saying that a particular factor (inconvenience to the plaintiff in *Robin*) "does not outweigh the benefit of having all necessary parties before the Court and preventing the need for a possible second trial later".[4]

[28] The Associate Judge noted that counsel for Hi Tech and Onward put their emphasis on the plaintiff's case as pleaded and the weighing of convenience to the parties, in particular, the Court's concern to avoid having a joined party "idly involved in a trial" and the concern that a Court would have where the main allegations in the case indicated that the third party's involvement would be peripheral.

[29] He considered a significant feature of this earthquake litigation was that the plaintiff was choosing to sue only its insurer and thereby to enforce its rights under its contracts of insurance, and had chosen not to sue for defects which had arisen in the context of building repairs undertaken pursuant to contracts between builders and the plaintiff. He noted that, while IAG's counsel had identified ways in which the reports of the plaintiff's experts had indicated there may have been significant defects in work undertaken by one or more of the builders, Self-Realization did not seek damages for any such defects or omissions to complete contracted work.

[30] The Associate Judge noted that, on the evidence of IAG's structural engineer, very few of the allegations, if any, of defective work were against Onward or Hi Tech or both.

[31] The Associate Judge concluded:

> [66] In the way the plaintiff has brought this proceeding, it is focused on the contractual responsibilities of IAG as the insurer. IAG, through joining the Hawkins companies and Brenchley will have the opportunity through the

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2 Referring to his statement of principles in *TSB Bank Ltd v Burgess* [2013] NZHC 1228 at [38]; also *Robin v IAG New Zealand Ltd* [2018] NZHC 1464.

3 *Robin v IAG New Zealand Ltd*, above n 2, at [58].

4 At [46].

one proceeding to obtain any relevant findings and judgment that arise from the work undertaken by the entities which Ms Kaur's evidence suggests were most centrally involved in any repair deficits. The Court recognises that an order striking out the third party claims against Onward and Hi Tech will expose IAG to a degree of the risk identified by Scrutton LJ in *Barclays Bank Ltd v Tom*.[5] To be weighed against that risk, however, is the risk that two builders, whose role even on Mr Gorinski's figures appears to have been modest, will be drawn into all the interlocutory issues, briefing of experts and costs of trial which are associated with earthquake claims which involve repair methodology and the scoping and costing of remediation. This is a case where there is a grave risk to the third parties that they would sit idly by while the plaintiff's pleaded claim takes up the preponderance of preparation and trial time.

[67] This is not a case where a relevant limitations period looms as a difficulty for IAG. If, through the judgment in this proceeding[,] IAG is of the view that a claim remains as against Onward, Hi Tech or both, there will be the opportunity to pursue that in a manner which is focused on alleged shortcomings of either builder. Mr Collette-Moxon, in his submissions, emphasised that IAG, in the event it makes payment of repair costs to the plaintiff, will acquire through subrogation the rights of the plaintiff as against the builders.

[68] Some delay may ensue to IAG. But the Court of Appeal's observations in *KPMG Peat Marwick v Cory Wright and Salmon Ltd (in Rec)* are appropriately to be repeated:[6]

> The interests of justice between all parties must be paramount … If there is delay it will be regrettable … but the attainment of justice by the most efficient means has to be the overriding consideration.

Review principles

[32] There was no disagreement as to these. As set out by counsel for IAG, they are:

i. Although revoked by section 183(a) Senior Courts Act 2016, s26P Judicature Act 1908 and HCR 2.3(4) continue to apply, as this proceeding was filed prior to 1 March 2017.[7]

ii. HCR 2.3(4) provides that the review shall proceed as a rehearing.

iii. The applicant bears the burden of persuading the court that the Associate Judge's decision was wrong.[8]

iv. Where an Associate Judge's decision involves the exercise of a discretion, the applicant must show that the Judge acted on a wrong principle that he failed to take into account a relevant matter or took into account some irrelevant matter, or was "*plainly wrong*".[9]

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5 *Barclays Bank Ltd v Tom* [1923] 1 KB 221 (CA).
6 *KPMG Peat Marwick v Cory Wright and Salmon Ltd (in Rec)* CA77/94, 20 May 1994 at 6.
7 *Sutcliffe v Tarr* [2017] NZCA 360, [2018] 2 NZLR 92.
8 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4].
9 *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481 (HC); *Robin v IAG*, above n 2.

Submissions for Onward

[33] Counsel for Onward, Mr McIntyre, submitted the Associate Judge did not err in his decision and submitted there were five key reasons why the Associate Judge's decision should not be overturned:

a. The plaintiff's case does not plead defective repair and the plaintiff has expressly stated that it does not have an issue with Building Onward's work;

b. IAG's pleading is contingent on the plaintiff's claim. It does not raise any independent basis to allege Building Onward's work was defective.

c. If Building Onward is joined as a third party, it will add considerable expense and delay to the proceedings where it will likely sit idly by for most of a complex insurance trial. This will not secure a just, speedy and inexpensive determination of the proceeding;

d. The High Court decision in *Robin* is distinguishable;

e. Building Onward is the only remaining third party as the other parties have gone into liquidation or are likely to, so there is no justice having all "potentially responsible" parties before the Court, particularly when Building Onward is not a responsible party.

Submissions for IAG and discussion

[34] Counsel for IAG submitted the Associate Judge had made a number of errors in his decision. I now deal with those submitted errors and discuss them.

The applications, originally by Onward and Hi Tech, in effect relied on both the merits (thus strike out principles) and inappropriateness of joinder (issues of convenience and overall justice). Both Onward and Hi Tech filed substantial affidavits which addressed the substantive merits and sought to demonstrate there was no case on the facts. The Associate Judge conflated the two bases and failed to apply proper strike out principles when he went into the merits.

The Associate Judge erroneously entered into an examination and assessment of contentious and lengthy evidence.

[35] I do not consider the Associate Judge was in error in this way. He did not strike out the third party claims on the basis that, on his consideration of the evidence before the Court, presented by way of affidavit, Self-Realization could not succeed as against IAG or as against Onward or Hi Tech. He noted that, on the pleadings, Self-Realization was not making any claim that either Onward or Hi Tech were in breach

of their contractual obligations to Self-Realization. He did not conclude, on any assessment of the evidence, that IAG would not be able to seek a remedy as against Onward and Hi Tech. The Judge acknowledged that striking out the third party claims against Onward and Hi Tech would expose IAG to a degree of risk identified by Scrunton LJ in *Barclays Bank Ltd v Tom*.[10] In doing so, the Associate Judge recognised that it was possible that, if Self-Realization did obtain judgment against IAG, IAG might pursue a claim against the third party builders. He did not determine that any such claim would have no prospect of success.

[36] The Judge did refer to evidence. He also noted there appeared to be a difference over the extent to which various experts identified the extent to which defects for which Self-Realization was claiming could have resulted from defective repair work. He referred to the evidence from Mr Gorinski, a project manager, that he estimated the costs of rectifying Onward's defective and substandard workmanship at $66,529.02 including GST for Highsted Road. He did comment that Mr Gorinski's analysis had to be treated with care. Unlike another witness, Ms Kaur, Mr Gorinski had not visited the site and inspected the work.

[37] Although the Associate Judge did refer to the evidence, that was primarily to assess the extent to which the third parties would have an interest in both legal and evidential issues as between Self-Realization and IAG. It was on that basis the Judge concluded this was a case where there was "a grave risk to the third parties that they would sit idly by while the plaintiff's pleaded claim takes up the preponderance of preparation and trial time".

[38] It was appropriate for the Judge to make that assessment primarily on the basis of the pleadings but also on the basis of the evidence which IAG had put before the Court. It was particularly appropriate where Self-Realization had made it clear it was not pursuing any claim for defective workmanship against Onward.

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[10] *Barclays Bank Ltd v Tom*, above n 5. The risks identified there were:
(a) differing results in different proceedings;
(b) delay in resolving matters as between relevant parties; and
(c) the expense of two trials and a potential exposure to a costs award.

[39] IAG had filed an affidavit from Ms Kaur, sworn 8 August 2017, in support of IAG's then application to join the six ultimate third parties as defendants. She was a structural engineer who had been instructed by IAG to inspect Self-Realization's properties. She had reviewed Self-Realization's claim, the building contracts and scope of works between Self-Realization and the three building companies. She visited the Sawyers Arms Road property on 24 March 2017 and the Highsted Road property on 27 and 28 March 2017.

[40] In his submissions for IAG, Mr Gedye referred to the affidavit of Ms Kaur as providing:

> … an adequate preliminary evidential foundation which demonstrated that the acts and omissions of the builders were inextricably linked with the matters which would be traversed at trial between plaintiff and defendant, regardless of how the plaintiff had chosen to plead its case.

[41] In a schedule attached to her affidavit, Ms Kaur identified 41 categories of potential defects at the Highsted Road property. On six of those categories, she considered no repair was required. As to another five categories, she said the elements she observed were not earthquake related. On 21 of those categories, she identified that the only relevant parties involved were Hawkins companies. On five of the categories, she identified the parties involved as being Hawkins and Brenchley. On four other categories, she identified the parties involved as being Hawkins, Brenchley and Onward.

[42] In his affidavit, Mr Gorinski provided an estimate as to costs that could be incurred in rectifying defective work if the allegations of defective and substandard workmanship against Onward in various reports were to be proved at trial. He did that acknowledging "the extent of works apparently completed by [Onward] prior to its exit from the project is unclear, particularly in relation to internal plaster and paint works to 100 Highsted Road".

[43] On Ms Kaur's evidence, the defects with which Onward might have been involved, in association potentially with Hawkins and Brenchley, in a situation where Self-Realization had made it clear it was not alleging there was defective workmanship on the part of Onward, related to:

(a) minor ceiling separation from timber framing in the waiting room;

(b) minor separation at column and wall in the waiting room;

(c) separation of skirting in the waiting room; and

(d) hairline cracks at corner of skylight frame in Mahasaya room.

[44] On Ms Kaur's evidence, it was Onward's potential responsibility for these matters which IAG says justified Onward being joined as a third party.

[45] I have also had regard to the affidavit of Christine Seymour-East, an employee of IAG, filed in support of the original application for orders joining the ultimate third parties as additional defendants. Mr Gorinski said in his affidavit he had also considered this affidavit. In her affidavit, Ms Seymour-East describes how Self-Realization elected to repair the properties with the assistance of Hawkins and, through Hawkins, contracted with Brenchley to carry out repairs at Highsted Road at a cost of $131,400 with a cash settlement from IAG in respect of certain other work of $22,499.75. There were complaints of defective workmanship against Brenchley. Through Hawkins, Self-Realization entered into a contract with Onward. The work required at Highsted Road, facilitated by Hawkins, was priced at $172,716.15.

[46] In her affidavit, Ms Seymour-East said, on 11 September 2014, Onward gave notice to Self-Realization under their building contract that it was not being allowed sufficient time to complete its work by Self-Realization's director. As a result, many of the items in the second scope, work which Onward was to attend to, "were left uncompleted". At the request of Self-Realization, Onward was then replaced with Hi Tech. Hi Tech provided a scope of works costed at $73,047.05.

[47] In her affidavit, Ms Seymour-East said IAG had paid out $588,186.80 in total in relation to Self-Realization's claims. $89,514.21 had been paid to Self-Realization by way of cash settlement. She confirmed IAG had paid:

- $113,173.50 to Hawkins;
- $151,593.53 to Brenchley;

- $45,844.05 to Onward; and
- $96,355.89 to Hi Tech.

[48] I infer from Ms Seymour-East's affidavit, the work done by Onward, for which Self-Realization was insured and for which IAG accepted liability under its policy, was for only a small portion of the total costs for which IAG agrees Self-Realization was entitled to under their policy.

[49] I do not need to make any findings on evidence in dispute. On my assessment of IAG's evidence, I am satisfied Onward would have only a limited interest in both the legal and evidential issues which will have to be resolved as between Self-Realization and IAG, and now as between IAG and QBE.

The Associate Judge failed to identify, or give effect to, Self-Realization's need to adduce evidence, and also test IAG's evidence, about the workmanship and performance of both Onward and Hi Tech in order to make out its case at trial.

The Associate Judge failed to identify and take into account the extent to which IAG's pleaded defence to the plaintiff's claim puts the third parties workmanship in issue, and requires comprehensive evidence at trial of the plaintiff's claim about the acts and omissions of the builders.

[50] The particular pleaded defence counsel referred to was:

> The Policy does not indemnify the plaintiff for defective building work and to the extent that the claim is for such work, the defendant is not liable for the cost of remediating or rebuilding same as undertaken by the plaintiff and/or its contractors.

[51] I do not consider the Judge made any error in this regard. He referred to the functions of third party proceedings, as identified by Sutton LJ in *Barclays Bank v Tom*.[11] In that way, he recognised that, if there were separate proceedings against the third parties, issues that might have to be addressed as between IAG and the builders might have to be dealt with in two separate trials. The Associate Judge referred to the principles which he had gathered together in his judgment in *TSB Bank Ltd v Burgess* to inform the exercise of the jurisdiction in this area. One of those principles was:[12]

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11 *Barclays Bank Ltd v Tom*, above n 5.
12 *TSB Bank v Burgess*, above n 2, at [38].

(e) Where the third party claim is based on the r 4.4(1)(b) ground that the relief claimed from the third party is connected with the subject matter of the proceeding and is substantially the same as that claimed by the plaintiff against the defendant, important considerations in determining whether the relief falls within such categories are:

- the degree of factual overlap;
- whether the joinder of the third party will determine the ultimate imposition of financial burden.[13]

[52] On his consideration of the pleadings, it was his assessment, even on the evidence of Mr Gorinski, that the role of both Hi Tech and Onward in what is factually at issue in the proceedings appeared to have been modest. For the reasons discussed above, that was an appropriate and reasonable assessment to make.

[53] That factual issues may arise in a trial involving Self-Realization, IAG and QBE concerning work done by Onward, is not necessarily a sufficient reason for requiring Onward to become a party to the proceedings as a third party.

[54] Commonly, in earthquake list cases in Christchurch now, there are disputes as to whether the scope of works prepared to deal with earthquake damage for an insurer has been sufficient to deal with alleged earthquake damage. There are also now a number of cases where insured plaintiffs are claiming that the work done in repairing earthquake damage was either inadequate or defective. There has already been a case of that latter sort, *Bruce v IAG*, where the Court has been able to resolve issues as between the plaintiff and the insurer without either contractors or subcontractors being a party to the proceedings.[14]

[55] In *Bruce v IAG*, the plaintiffs' claim against IAG alleged numerous defects in the repair work. Some of the alleged defects were accepted by IAG. Some were in dispute. As here, there were allegations that IAG and the contractor builder had not attempted to remedy or repair other aspects of earthquake damage. The plaintiffs had entered into a building contract with one builder for $867,903. The plaintiffs and IAG

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13 *Mammoet Shipping BV v Compter* HC Whangarei CP13/86, 6 July 1987 at 10-11, adopting *Myers v N & J Sherick Ltd* [1974] 1 All ER 81 at 83 and *Allison v Church of England Hospital Inc* HC Christchurch A399/76, 25 August 1980.

14 *Bruce v IAG New Zealand Ltd* [2018] NZHC 3444.

were able to deal with all that was at issue without any contractors being joined, either as a further defendant or third party.[15]

[56] IAG and Self-Realization already have the benefit of knowing in reasonable detail what Onward's response would be to any suggestion that there were defects in the work Onward carried out on their contract with Self-Realization. The sole director and shareholder of Onward, Mr O'Neill, swore an affidavit in support of the application to set aside the third party notice. He says that, when Onward terminated its contract with Self-Realization, there was a 90 day defect notification period. In that affidavit, he said Self-Realization had never raised any issue as to the level of their workmanship. It is his evidence that Onward did receive a defects list. That list was discussed with Hawkins who were managing the work for the plaintiffs and IAG. He says Onward attended to defects it was responsible for. No further issues were raised with them as to the work that was done.

[57] Self-Realization has made it clear in its pleadings and in correspondence from counsel that it is not claiming there were any defects in the work Onward did.

[58] In an affidavit in support of Onward's application to strike out the third party notice against Onward, there was a letter dated 6 August 2018 from the lawyers for Self-Realization to Onward's solicitors stating:

> We can confirm that plaintiff's position is that the work carried out by the proposed fourth, fifth, and sixth defendants does not form the basis or any part of the claim by the plaintiff against the defendant.
>
> The basis of the plaintiff's claim against the defendant is that the work carried out and paid for by the defendant does not meet the policy standard.
>
> We reiterate that the plaintiff is not pleading that the repairs were defective.

[59] Self-Realization filed a notice of opposition to IAG's original application to join the third parties as defendants but indicated in that notice that it would consent to the joinder of those parties as third parties. In that document, counsel for Self-Realization said the presence of the six ultimate third parties as defendants was not necessary to adjudicate on or settle any of the questions in the proceeding. Counsel

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[15] The Hawkins Companies and QBE were joined as third parties. The Hawkins Companies were in liquidation at the time of trial. It does not appear QBE played any part in the trial.

contended the Hawkins-related proposed defendants were appointed by IAG to provide project management services in respect of IAG's customers including Self-Realization and asserted "in doing so these proposed defendants [were] carrying out, on behalf of the first defendant, the first defendant's obligations under the policy". Self-Realization said in its notice of opposition that:

> The work carried out by the proposed fourth, fifth and sixth defendants does not form the basis or any part of the claim by the plaintiff against the first defendant.
>
> The basis of the plaintiff's claim against the defendant is that the work carried out and paid for by the defendant does not meet the policy standard, not that the repairs were defective. That is an issue between the plaintiff and the defendant, not the proposed defendants, none of whom owed any obligations to the plaintiff pursuant to the policy.

[60] In its statement of defence to Self-Realization's claim, IAG says it is not liable under its policy for repairs that are required as a result of defective work on the part of the contractors. Self-Realization has alleged it is not making any claim based on defective work. IAG says, nevertheless, Self-Realization's claim is based on a report obtained by engineers which identifies certain defects in the Highsted Road building as resulting from the earthquake and which IAG would assert would have to be the result of defective work in certain respects on the part of one or other of the contractors.

[61] IAG says that, despite the pleadings, there could be a dispute over defects in the Highsted Road building and whether those defects were the result of poor workmanship. IAG says, because of that potential, IAG should be able to bring Onward into the proceedings as a third party.

[62] The Associate Judge did not discount the possibility that some of the defects at issue might have arisen out of work done by Onward or Hi Tech. If that turned out to be the case, he did not discount the possibility that, in a trial of these proceedings, the Court might make findings in this regard. What he did was have regard to those possibilities, weigh up risks associated with that in the context of their modest involvement in what was at issue against the justice of requiring two of the contractors to be:

> … drawn into all the interlocutory issues, briefing of experts and costs of trial which are associated with earthquake claims which involve repair methodology and the scoping and costing of remediation.

[63] The Judge did not make a finding that Onward would have no involvement in the trial. What he determined was that Onward would not be involved with the preponderance of preparation and trial time required in IAG's response to Self-Realization's claim.

[64] I consider there was no error in that conclusion. At that time, he weighed up matters on the basis Self-Realization would be continuing with a claim where Brenchley, Onward and Hi Tech would all be actively involved as third parties.

[65] QBE is now involved as a third party. The weighing now between Onward's potential involvement as to issues in the case, as against the preponderance of preparation and trial time with which it would have no involvement, is now even more heavily in Onward's favour.

The Associate Judge failed to recognise and give effect to the defendant's contingent subrogation rights.

[66] IAG submits that, where a defendant insurer is entitled to seek a declaration which would be relevant to potential subrogation rights, the plaintiff's election not to sue the builders should be given no weight. The law recognises a right to seek such a declaration by a party which may acquire subrogation rights.

[67] I am satisfied the Associate Judge did consider the potential for IAG, by subrogation, to enforce the plaintiff's entitlement to reimbursement of any excessive payment to the builder. He referred to IAG's submissions as to this in his judgment.[16]

[68] In this regard, IAG relied on Gendall J as to the relevance of IAG's contingent subrogation rights, as discussed in his judgment in *Robin v IAG*.[17] Gendall J was there concerned, on an application for review, whether an Associate Judge had been in error in declining leave to IAG to join various contractors as defendants. Gendall J said:

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16 At [41] and [67].

17 *Robin v IAG New Zealand Ltd*, above n 2.

> [23] IAG's key motivation in having the proposed defendants joined is to ensure that, if IAG is found to be liable to Ms Robin, it would obtain subrogation rights that would enable it to pursue her claim against those proposed defendants. It can only affect [sic] these rights if the liabilities of the proposed defendants to Ms Robin have been determined. Failing to accommodate the possible subrogation rights now would result in IAG, if found liable, having to initiate a subsequent trial dealing with essentially the same matters. This is an outcome r 4.56 is designed to prevent.
>
> [24] Submissions were advanced for Ms Robin, however, noting that, no rights of subrogation arise until or unless IAG is obliged to make payment under the policy. IAG maintained in response, however, that this should not be an impediment to joinder. I agree. In my view, this case is no different from a guarantee or indemnity case in that respect, so this does not prevent joinder.

[69] In the circumstances of that case, Gendall J accepted that the insurer's rights to subrogation would not arise until the insurer had made payment under the policy. He did not consider that should be an impediment to joinder of the defendants against whom potentially the insurer might have a claim by way of subrogation. It was not suggested to me there was any error in that view.

[70] The insurer must sue in the insured's name.[18] Subrogation rights are, subject to contract, exercisable only where the insurer has made full payment under the policy. Even if the insurer has satisfied its obligations under the policy, it has no right to demand control of the action until the insured has received a full indemnity.

[71] The insurer is limited under a subrogation recovery to the amount of its own payment to the insured plus interest.[19]

[72] I have considered whether IAG's potential right to bring a claim against Onward through rights of subrogation provide a compelling reason for IAG to be able to continue with its third party claim against Onward.

[73] On the pleadings as they stand, Self-Realization elected not to sue Onward. It has made it clear, through correspondence and in its notice of opposition to IAG's original application for leave to join contractors as third parties, that it does not allege in its pleadings that work carried out by Onward was defective. It does not allege in

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18 *Central Insurance Co Ltd v Seacalf Shipping Corp* [1983] 2 Lloyd's Rep 25.
19 *Yorkshire Insurance Co Ltd v Nisbet Shopping Co Ltd* [1962] 2 QB 330.

its pleadings that IAG must indemnify them for the costs of remedying defective work carried out by Onward.

[74] IAG pleads in its defence that, under the plaintiff's policy with IAG, IAG would have no liability to the plaintiff for the costs of remedying defective work on the part of Onward.

[75] For IAG to have rights to recover from Onward, Self-Realization will have to establish at trial that repair work done by Onward was defective, contrary to its own pleadings and the basis on which it is bringing its claim. Contrary to IAG's pleaded assertion as to what the policy required of IAG, the Court would have to find that IAG's policy required IAG to meet the costs of remedying those defects. IAG would then have to accept the Court's judgment in that regard and make payment to Self-Realization accordingly.

[76] It is also relevant that, on its third party claim, the relief which IAG was seeking was a declaration under s 2 Declaratory Judgments Act that Onward is liable to Self-Realization under their contract for an amount to be particularised prior to trial.

[77] IAG would also have to persuade a Court to exercise its discretion to make such a declaration purportedly for the benefit of Self-Realization on a basis which Self-Realization had disavowed. The Court would also have to consider whether it was just to make such a declaration for the benefit of IAG on a basis which IAG had denied throughout the course of the proceedings.

[78] I am not going to predetermine whether the Court would make such a declaration. This is not a case where, on the pleadings as they stand, it is clear that, even if Self-Realization were to succeed against IAG, IAG would be entitled to the relief it would seek if Onward were joined as a third party. That is also a matter I weigh in the balance against joinder.

The Associate Judge failed to give effect to the fundamental need to have all questions determined in the one proceeding between all parties.

[79] In support of this submission, Mr Gedye relied heavily on the approach taken by Gendall J in *Robin v IAG*.[20]

[80] There can be no question that the Associate Judge had regard to the potential value of having all relevant parties between the Court so that the Court could determine all potential issues as between all parties.

[81] The Associate Judge quoted the essential submission made for IAG in the matter before him as follows:[21]

> Similar factors were considered by the High Court in the recent interlocutory decision *Robin v IAG New Zealand Limited*… While in the context of an application to join further defendants, not third parties, it has persuasive value for the third party regime. It illustrates the lengths to which it may be appropriate for a court to go to ensure all necessary parties are joined into one proceeding. With reference to "the wider interests of pragmatism", the Court said "it is in the interests of justice that the proposed defendants be present to deal with all relevant issues, to represent their own interests and to avoid a multiplicity of hearings". A similar determination earlier in the judgement was that a particular factor (inconvenience to the plaintiff in that case) "does not outweigh the benefit of having all necessary parties before the Court and preventing the need for a possible second trial later".

[82] The Associate Judge carefully considered what Gendall J had said in that judgment but distinguished *Robin*. He was right to do so.

[83] In background facts in *Robin*, Gendall J referred to Ms Robin making a claim against IAG under an insurance policy for her property which required IAG to pay "the cost of restoring it to a condition as nearly as possible equal to its condition when new". IAG appointed Hawkins to act on its behalf in assessing the scope of works required to effect repairs and to monitor the repair work undertaken. Hawkins appointed Canterbury Reconstructions Ltd (CRL) to carry out repairs to the house. Gendall J's judgment recites:

> [4] Ms Robin argues that the repairs to the house have not been carried out to the standard required by the IAG policy. She seeks an order that IAG

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20 *Robin v IAG New Zealand Ltd*, above n 2.
21 At [59]. Citations omitted.

> specifically perform its duties pursuant to the policy by paying the costs to remediate the defective repairs, or, alternatively, pay damages in the amount required to repair the house to a good standard of workmanship with all earthquake damage properly repaired.
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> [5] Ms Robin also sues CRL (being the party appointed by Hawkins to carry out and manage the house repairs) in the tort of negligence, contending that CRL breached the duty of care it owed to her to ensure that those repairs were carried out to a good standard of workmanship with all earthquake damage properly repaired.

[84] Later in his judgment, Gendall J referred to Ms Robin attempting to argue that the issue was not whether the work was deficient but solely whether IAG had restored the property to the policy standard. In line with that argument, he said she had suggested this did not depend on whether the repairs were carried out properly. He said that submission:

> … mischaracterises the proceeding and her pleadings. The quality of the repairs is in question. Ms Robin has sued CRL in tort for breaching its duty of care to her to carry out the repairs to a reasonable standard.

[85] In contrast, in this case, there is no pleading that repairs were carried out in a way which was substandard and there is neither a pleading nor an intention on the part of Self-Realization to assert that, as a question of fact, there was such defective repair work.

[86] In *Robin*, the plaintiff had sued CRL as the second defendant in negligence. As Gendall J noted, she pleaded that CRL breached a duty of care owed to her to ensure the repairs to the house were carried out to a good standard of workmanship so that all earthquake damage was properly repaired. Gendall J noted that CRL was the company appointed by Hawkins to carry out and manage the house repairs. He held it must follow that the subcontractors or co-contractors, which IAG wished to join as defendants, must arguably have breached the duty which the plaintiffs say was owed to them by CRL. Gendall J said "they were the parties that actually carried out the work to the house, while CRL managed the project".

[87] In this instance, for reasons already discussed, both Onward and Hi Tech together had been responsible for only a modest portion of the total repair work required. The proportion of repair work for which Onward was responsible was even less.

[88] Just as with the situation the Associate Judge dealt with, Gendall J did consider where the balance of convenience lay with regard to the joinder of the proposed defendants. He referred to the difficulties the plaintiff would face through having had no contractual relationship with them and her having no knowledge of the work they were contracted to perform, her argument that she would have to rely on IAG to plead her case, and that hearing evidence and issues in relation to the proposed defendants would prolong the proceeding and cause her additional costs.

[89] Gendall J acknowledged that the joining of the proposed defendants would inevitably cause some adverse effects to the plaintiff but decided that this did not "out-weigh the benefit of having all necessary parties before the Court and preventing the need for a possible second trial later". In that regard, he noted the majority of the evidence Ms Robin would require to prove a breach of a duty of care by the proposed co-defendant contractors would be the same as that required for her present claim against CRL. It would have been the same as that required for her alternative claim as pleaded against IAG. It was on that basis he did not consider the potential inconvenience and adverse effects to the plaintiff should prevent joinder of the two new defendants.

[90] Mr Gedye argued that, as it turned out, *Robin* was on all fours with the present case because, when Gendall J had to consider the Associate Judge's decision on review, the second defendant in that case, CRL, was insolvent. It was thus unlikely that CRL would be able to pass on any liability it might have to the plaintiffs through to subcontractors in the way the Associate Judge had contemplated when he initially declined leave to IAG to join the further contractors as defendants.

[91] That development did not mean that the circumstances in *Robin* were on all fours with this case. As Gendall J recorded at the outset of his judgment, the plaintiff in *Robin* had sought an order that IAG specifically perform its duties pursuant to the policy by paying the costs to remediate the defective repairs or, alternatively, pay damages in the amount required to repair the house to a good standard of workmanship with all earthquake damaged properly repaired. In this case, there is no such pleading by Self-Realization against the insurer. In *Robin*, in contrast to this case, the co-contractors and proposed further defendants had done all the repair work.

[92] I did note that, in *Robin*, Gendall J said that, had he considered it was not appropriate to join the two subcontractors, it would have been appropriate for them to be joined as third parties and there would have been no real opposition to that. Bringing them in that way would have avoided some of the potential unfairness which could arise out of the plaintiff being forced to sue, as a defendant, a party with whom the plaintiff had no contractual arrangement and whose work had been carried out under the oversight of other parties. Allowing an insurer to join contractors or subcontractors as third parties, essentially for the benefit of an insurer who might have a liability to the party, would leave the insurer responsible for making the running in the proceedings against those contractors with the cost consequences and risks that would flow from that.

[93] I recognise in *Robin* Gendall J considered it in the interests of justice that the proposed defendants be present in order to deal with all relevant issues, to represent their own interests and to avoid a multiplicity of hearings. That ultimate conclusion was reached in a situation where, both on the pleadings and on the facts as alleged, *Robin* was significantly different to this case.

[94] Consistent however with the decision which both the Associate Judge and now on review I must make, Gendall J considered it appropriate to have regard to the "wider interests of pragmatism" and ultimately "the interests of justice".

[95] *Robin* is not authority for the proposition that, in any situation where a person whose work may be the subject of investigation or dispute in an earthquake damage case and who could have a liability to an existing party to the proceedings, it will be appropriate for that person to be joined either as a defendant or as a third party.

[96] Mr Gedye also sought support for IAG's position in a statement of Cooke J (as he then was) in *Turpin v Direct Transport Ltd*.[22] Cooke J allowed a defendant to amend a claim against a third party. In doing so, he observed:[23]

> It would be extremely inconvenient if the action were fought out on the basis of the present pleadings and the plaintiff recovered from the second defendant but the second defendant failed against the third party on those pleadings.

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22 *Turpin v Direct Transport Ltd* [1975] 2 NZLR 172 (SC).
23 At 175.

> Then, if the second defendant wished to pursue the implied warranty allegation against the third party, a separate action would be necessary. It is just such a complexity and multiplicity of procedure that the third party rules are designed to prevent.

[97] Those comments were however made in a case where the third party was already involved in the proceedings. The issue was simply whether a second defendant should be permitted to add a cause of action to its claim against the third party.

[98] The last of the principles which Associate Judge Osborne collated in *TSB Bank Ltd v Burgess* was:[24]

> [38](m) When all the circumstances of a proposed third party joinder have been taken into account, the overriding consideration is the interests of justice. In *KPMG Peat Marwick v Cory-Wright & Salmon Ltd (in Rec)* the Court of Appeal said:[25]
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> > The interests of justice between all parties must be paramount … if there is delay it will be regrettable … but the attainment of justice by the most efficient means has to be the overriding consideration.

[99] This is also reflected in *McGechan on Procedure* on what was the relevant rule as to the setting aside of a third party notice:[26]

> The Court will have regard to the criteria set out under r 4.4(1) …: *Green v S G Harvey Ltd* (1991) 3 PRNZ 139 (HC). Rule 4.16 confers a wide jurisdiction under which third party notices may be set aside, even if they satisfy the requirements of r 4.4: *Turner v First Fifteen Holdings Ltd* (1991) 3 PRNZ 145 (HC). This will be particularly so if the third party's involvement is somewhat peripheral to the main allegations against the defendant.

[100] In *BNZ v Equiticorp Industries Group Ltd*, the Court of Appeal said:[27]

> Joinder of third parties against whom a defendant has a claim coming within the permissible scope of third-party procedure cannot be insisted upon as of right. Under the current High Court Rules, by R 75 leave is required to issue a third-party notice if, as in this case, more than 14 days has elapsed after the time for filing the statement of defence. Even when the notice has been issued and served within time, R 160 gives the third party the right to apply to the Court to set aside the notice. On a leave application under R 75 or an application to set aside under R 160 the Court has a wide discretion. The

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24 *TSB Bank Ltd v Burgess*, above n 2.
25 *KPMG Peat Marwick v Cory Wright and Salmon Ltd (in Rec)*, above n 6.
26 *McGechan on Procedure* (online loose-leaf ed, Thomson Reuters) at [HR4.16.01].
27 *Bank of New Zealand v Equiticorp Industries Group Ltd (in statutory management)* [1994] 3 NZLR 548 (CA) at 552.

> desirability of comprehensive dealing with complicated commercial cases is an important consideration, but it may have to yield to others such as unreasonable delay.

[101] In considering the overall interests of justice, it is appropriate and necessary to consider the extent to which an intended third party would be associated with what is at issue in the proceedings, primarily on the basis of the pleadings but also with regard to affidavit evidence, which is not contentious.

[102] The importance of this was illustrated by McGechan J's judgment in *Mammoet Shipping BV v Compter*.[28]

[103] McGechan J there referred to the very important policy underlying the promotion of the third party procedure as being the desirability of ensuring that the courts do not reach separate and conflicting findings upon the one issue. But, as to that, he said "the consideration is only one of a number, and is to be kept in proportion".

[104] As to convenience, McGechan J said:

> Another aspect favouring use of the third party procedure is the convenience to parties, counsel, witnesses, and the Court in having only one hearing, albeit somewhat more protracted, as opposed to two or more. Once again however this factor must be kept in proportion. One hearing can in the end gain little, if the third party joined must sit idly through issues as between plaintiff and defendants in which it is little involved, and vice versa, as regards the plaintiff, even allowing for directions under R 438(4)(e).

The Associate Judge was in error in finding Onward and Hi Tech would be sitting idly by at trial for much of the case. The preponderance of trial evidence would concern the physical state of the property and what the builders did or omitted to do. The Judge's finding did not take account of the efficiencies that could be achieved through effective case management.

[105] As already discussed, on the basis of IAG's own evidence filed in support of its original application, Onward would not have been concerned with, by far, the majority of defects in the building which IAG's own witness, Ms Kaur, identified as not being connected with any builder and for which, on her analysis, the way in which those defects were dealt with lay with Hawkins.

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[28] *Mammoet Shipping BV v Compter*, above n 13.

[106] The Associate Judge was ideally placed to consider what might be achieved through case management in earthquake list cases. Onward is a company with a sole shareholder/director. Its involvement in all the work that was done in remedying earthquake damage was modest. Self-Realization's claim is, on the pleadings, not about the work that was done but about work which was not done and, on the plaintiff's pleadings, not required of any of the contractors. None of the other contractors are now involved with these proceedings.

[107] These proceedings primarily involve issues, both as to the evidence and the law, as between Self-Realization and IAG, and now also between IAG and QBE. If Onward is joined as a third party, it will have the burden of being involved in contentious proceedings in the High Court that are unlikely to go to a hearing for at least 12 months. It will have the cost of legal representation throughout the continuation of the proceedings with those solicitors having to be involved in case management conferences, potential issues of discovery, at least a watching brief as far as further interlocutory skirmishes between other parties, including now IAG and QBE are concerned.

[108] Onward's involvement in the proceedings will result in costs for the company. It will be involved in High Court litigation involving two major insurers. The insurers have all the resources, experience and financial resources to cope with such litigation. Onward will not be in that position. Its involvement as a third party in the proceedings will be a significant distraction for it in attempting to carry on its normal business.

[109] The well recognised risks, costs and burdens of litigation are often a major inducement to settle proceedings such as these. Joining Onward as a third party would create a risk that, through the costs and burden of being a party to the proceedings, Onward could be unfairly pressured to contribute to a settlement of a dispute which, in essence, is between Self-Realization and IAG, and now between IAG and QBE. The potential for the joinder of a third party to cause unfair pressure to be put on a party to resolve its part in proceedings in a way that might be unjust was a factor which

McGechan J took into account in declining leave to allow a third party claim in *Mammoet*.[29]

The Associate Judge failed to identify and take properly into account the inconsistency between having one builder (Brenchley) before the Court by consent of the plaintiff at trial as third party, with two other builders released.

[110] Whatever the position was before the Associate Judge, there is now no inconsistency. It is apparent from an affidavit recently filed in the proceedings that Brenchley would never have been actively involved in these proceedings. Brenchley had not traded since 2017. IAG's third party notice to Brenchley was filed in the High Court on 5 October 2017. Brenchley took no steps in response to that notice. Its only director died in late 2018. It seems likely that its way of coping with joinder, with the burden of being a third party in High Court proceedings, was simply to have ignored it.

The Associate Judge was in error in noting that the plaintiff had elected to sue only its insurer and had chosen not to sue for defects which had arisen in the context of building repairs.

[111] I do not consider the Judge was in error in this regard. It was relevant but not determinative that Self-Realization had chosen to sue only the insurer. It was relevant that the plaintiff was not claiming there were defects in the repair work, just as it was relevant that IAG was contending that, if there were defects in the building work, IAG would not have to indemnify Self-Realization for the cost of remedying those defects.

[112] In submissions, IAG referred to "the plaintiff's defective pleading" as causing the Judge to treat the case "as a narrowly confined insurance policy case".

[113] I do not consider there was any apparent error in this regard. On the plaintiff's claim as pleaded, there was clearly going to be an issue as to whether the defects in the building, which the plaintiff identified in its claim, had been remedied in the work required of the various contractors who were engaged to work on the building. The Judge considered the extent to which the contractors might have been involved in earthquake damage repair work. It was appropriate for the Judge to consider whether

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[29] *Mammoet Shipping BV v Compter*, above n 13.

the third party notices should be set aside on the basis of Self-Realization's case as pleaded. That was especially so when there was no intention on the part of Self-Realization to amend its pleadings or to rely on claimed defects in building work contrary to the way its case was pleaded.

[114] Mr Gedye referred to the judgment of Thomas J in *Telesis Corporation Ltd v Reed* as an instance where the High Court had recognised that it was wrong in principle to have extended reference to the evidence before the Court on an issue over joinder.[30] That judgment also illustrates how commonality of allegations as against defendants and proposed third parties, in conjunction with the prospect that, if those pleaded allegations are proved, they could give rise to the defendant having a valid claim for contribution from the proposed third parties, were of importance in deciding the defendant should be able to join the proposed third parties to the proceedings.

Conclusion

[115] There was no error in the way the Associate Judge reached his decision striking out the third party notice against Onward. I do not consider the Associate Judge failed to take account of any relevant consideration or had regard to an irrelevant consideration. He was not plainly wrong in the conclusion he reached.

[116] I have also dealt with this application for the review on a rehearing basis. There is some limited prospect that, if Onward is not joined as a third party to the proceedings, through rights of subrogation, IAG might have to pursue a claim against Onward in separate proceedings with the delay and costs that could be associated with that. Weighed against that would however be the cost and burden to Onward of having to remain as a party to proceedings in respect of which its exposure and its connection both with evidential and legal issues would be modest, and largely peripheral.

[117] The interests of justice between all parties are paramount. My assessment is that, in the particular circumstances of this case, it was not just for Onward to remain as a third party to the current proceedings.

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30 *Telesis Corporation Ltd v Reed* HC Auckland CP36/91, 4 November 1991.

[118] Accordingly, I decline IAG's application to review the Associate Judge's decision and confirm his judgment striking out the third party notice against Onward.

[119] Costs must follow the event. I note that Hi Tech was awarded costs as fixed following the Associate Judge's earlier judgment but on the basis they would not be payable until after the outcome of the review application was known. The Associate Judge accordingly directed that the costs would not be payable "until further order of the Court". Hi Tech is now in liquidation so cannot ask for an order that the costs awarded to it previously be paid. Although I have not had to deal with the application for review with respect to Hi Tech's position, I do not consider that, in all the circumstances of this case, it would be appropriate for IAG to refuse to pay the costs as previously ordered against it to the liquidator of Hi Tech.

[120] As far as the costs on the application for review are concerned, if the parties are unable to reach agreement, the following directions are to apply:

(a) costs memoranda are to be limited to four pages;

(b) Onward is to file and serve its memorandum within four weeks;

(c) IAG is to file and serve its memorandum in response within two weeks of receiving Onward's memorandum; and

(d) the Court will then determine the costs application on the papers.

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